

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONNELL SMITH

Claimant

VS.

RILEY FOOD SERVICES

Respondent

AND

CRUM & FORSTER INDEMNITY CO.

Insurance Carrier

Docket No. 1,053,520

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the May 11, 2011, preliminary hearing Order entered by Administrative Law Judge Rebecca A. Sanders. Bruce Alan Brumley, of Topeka, Kansas, appeared for claimant. D'Ambra M. Howard, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant is entitled to medical care and designated Dr. Joseph Sankoorikal as his authorized treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 11, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of whether claimant met his burden of proving that he suffered a compensable injury to his lumbar spine on September 18, 2010. The respondent further argues that the ALJ exceeded her jurisdiction by allowing claimant to designate his own authorized treating physician. Respondent asks that the Board reverse the Order of the ALJ.

Claimant asserts that he carried his burden of proof that his claim is compensable and that respondent's belated denial of compensability is without merit. Claimant contends

respondent is actually raising an issue of whether claimant needs medical treatment, and the Board does not have jurisdiction over that issue in an appeal of a preliminary hearing order. Claimant also argues that the ALJ has the authority to order medical treatment when the respondent fails to perform its duty to provide treatment under K.S.A. 2010 Supp. 44-510h(a).

The issues for the Board's review are:

- (1) Does the Board have jurisdiction over the issues in this appeal?
- (2) Did claimant meet his burden of proving that he suffered a compensable injury to his lumbar spine on September 18, 2010?
- (3) Did the ALJ exceed her jurisdiction by naming Dr. Sankoorikal as claimant's authorized treating physician rather than allowing respondent to provide claimant with a list of three physicians, out of whom claimant could choose one to be his authorized treating physician?

FINDINGS OF FACT

On September 18, 2010, claimant was working for respondent at the Fort Riley Army base. He was asked by his manager to wipe down the walls in the kitchen. He was standing on some cardboard on the counter wiping the walls when he slipped and fell. He hit his right shin on the sink and fell on his back. Claimant had a gash in his knee. He also immediately noticed pain in his low back. His manager told him to go home and come back to work the next day. Claimant, on his own, went to the Geary County Hospital emergency room, where he was treated by Michael Beffa, PA-C and released.¹ He testified that he still was having problems with his back after his release from the hospital. He described it as a throbbing pain in his back. But at the time, he was paying more attention to the knee injury than his back.

On October 18, 2010, claimant was seen by Mr. Beffa at Occupational Health Services (OHS). The medical record of that date indicates that claimant's chief complaint was an open wound on his right lower leg. The treatment only consisted of evaluation of claimant's right leg injury.² The report indicates claimant said he was currently pain free

¹ The emergency room records were not made a part of the record. It is unclear whether he went to the emergency room the date of the accident, September 18, 2010, or later on September 20, 2010. See report of Dr. Fevurly, Resp. Ex. A at 2 and report of Dr. Zimmerman, Cl. Ex. 1 at 1.

² P.H. Trans., Resp. Ex. B.

and was not having any areas of discomfort.³ He was discharged from treatment with no work restrictions.

Claimant was seen by Dr. Daniel Zimmerman on December 10, 2010, at the request of his attorney. Dr. Zimmerman reviewed claimant's medical records and took a history from the claimant. Claimant told Dr. Zimmerman he had fallen and landed on his back. Dr. Zimmerman's review of medical records indicates that when claimant was seen by Mr. Beffa at the emergency room, he gave a history of back problems and reoccurring joint pains. Mr. Beffa saw claimant again on September 22, 2101, at which time claimant complained of left sided low back pain. Dr. Zimmerman noted that claimant had received no treatment for his back pain as a result of the fall.

In examining claimant, Dr. Zimmerman found that claimant had range of motion restrictions at the lumbar level and pain and discomfort in palpation over the left lumbar paraspinous musculature. Dr. Zimmerman stated: "I believe status post the injury affecting the lumbar spine that occurred on or about September 18, 2010, that Mr. Smith has not yet achieved maximum medical improvement."⁴

Claimant was also seen by Dr. Chris Fevurly on March 31, 2011, at the request of respondent. Claimant told Dr. Fevurly that he experienced low back pain and right shin pain within 24 hours of the work-related accident. Dr. Fevurly also reviewed claimant's medical records and noted the emergency room reports indicated that claimant reported his back pain was resolving by September 18, 2010, and that he had no spinal tenderness on examination. However, Dr. Fevurly also noted that on September 20, 2010, claimant reported left low back pain when seen at OHS. He was still complaining of low back pain at the time of his examination by Dr. Fevurly.

Dr. Fevurly said his examination of claimant was completely normal, but he also reported that claimant had tenderness of the low back, particularly over the left superior iliac spine. He diagnosed claimant with regional back pain, nonradicular, and abrasion and contusion of the right shin, resolved. He found claimant to be at maximum medical improvement from the work event since October 8, 2010.⁵ He stated that claimant could return to full and unrestricted duties at any job.

³ Claimant denied he said he was pain free at that time. P.H. Trans. at 20-21.

⁴ P.H. Trans., Cl. Ex. 1 at 4.

⁵ "The exam is currently normal. There is subjective complaint of low back pain but there are no objective findings. The original injury was a simple sprain/strain/contusion. There is documentation of resolution of the low back pain by 10/8/10. The current complaints have no causal relationship to injury from the work event on 9/18/10. The current complaints are associated with underlying psychological, social, behavioral and environmental factors." Report of Dr. Fevurly, P.H. Trans., Resp. Ex. A at 3.

Dr. Fevurly's report indicates that claimant was working out at a gymnasium regularly. The report also notes that claimant hoped to try out for a semi-professional baseball team for the summer. At the preliminary hearing, claimant testified that he had played for a semi professional baseball team in the past and had planned on playing again in 2011. But because of his back pain, he was unable to train or work out. He said he has not been doing any sort of regular exercise or training regimen in order to play baseball. Claimant was not playing baseball now. He did not try to go out this year because he was not ready and because of his back pain. Claimant also said he had not been working out in a gymnasium regularly. When he goes to the gym, he stands in one spot and shoots a basketball around. He does not lift weights or run on the treadmill.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁶ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁷

K.S.A. 2010 Supp. 44-510h states in part:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

(b)(1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may

⁶ K.S.A. 2010 Supp. 44-501(a).

⁷ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

K.S.A. 44-510j(h) states in part:

If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2010 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,⁸ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁰

ANALYSIS

Claimant described an accident at work where he fell and injured his back. He made complaints of back pain which are documented in the contemporaneous medical records. Claimant has ongoing complaints of back pain which he attributes to his work injury. There is no evidence of claimant having sustained an intervening injury. The greater weight of the medical evidence supports claimant's claim that he has back symptoms that are directly traceable to his fall at work on September 18, 2010.

Here, respondent alleges the ALJ exceeded her jurisdiction in granting claimant's request to appoint Dr. Sankoorikal as his authorized treating physician. Claimant requested that the ALJ determine he is in need of ongoing treatment and authorize a physician to provide that treatment. The Board has ruled in the past and continues to hold that this is not a jurisdictional issue subject to review on an appeal from a preliminary hearing order.¹¹ Whether the ALJ must, in a given set of circumstances, authorize treatment from a list of three physicians designated by respondent is not a question which goes to the jurisdiction of the ALJ. At a preliminary hearing, an ALJ has the jurisdiction to decide questions concerning the furnishing of medical treatment.

⁸ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁹ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹⁰ K.S.A. 2010 Supp. 44-555c(k).

¹¹ See *Hubbard v. Wesley Medical Center, LLC*, No. 1,040,850, 2008 WL 5122323 (Kan. WCAB Nov. 7, 2008); *Spears v. Penmac Personnel Services, Inc.*, No. 1,021,857, 2005 WL 2519628 (Kan. WCAB Sept. 30, 2005); *Briceno v. Wichita Inn West*, No. 211,226, 1997 WL 107613 (Kan. WCAB Feb. 27, 1997); *Graham v. Rubbermaid Specialty Products*, No. 219, 395, 1997 WL 377947 (Kan. WCAB June 10, 1997).

While there is generally no jurisdiction to consider matters of medical treatment, whether an ALJ exceeds his or her jurisdiction is jurisdictional. After a thorough review of the file this Board Member finds nothing to suggest that the ALJ exceeded her jurisdiction in making her decision. ALJs must routinely determine the most appropriate method of treatment in order to satisfy the Act's goal of curing and relieving the effects of the injury.¹² Determinations of whether claimant is at maximum medical improvement, whether claimant is in need of additional medical treatment, and selecting one treatment provider over another do not equate to decisions that exceed the ALJ's authority. Rather, as is contemplated under K.S.A. 44-534a, the ALJ determined issues regarding the furnishing of medical treatment.

CONCLUSION

(1) The Board has jurisdiction on an appeal from a preliminary hearing order to review a finding that claimant sustained personal injury by an accident that arose out of and in the course of his employment with respondent. The Board does not have jurisdiction to review the ALJ's finding that claimant is in need of treatment for the injury.

(2) Claimant sustained injuries, including injury to his low back, by the accident that occurred at work on September 18, 2010. That accident arose out of and in the course of his employment with respondent. Claimant's current need for treatment is a result of that accident.

(3) The ALJ did not exceed her jurisdiction by naming an authorized treating physician for claimant where respondent was not providing claimant with medical treatment.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated May 11, 2011, is affirmed.

IT IS SO ORDERED.

¹²K.S.A. 2010 Supp. 44-510h(a).

Dated this _____ day of July, 2011.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge